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No. 84-147

In The

Supreme Court of the United States

October Term, 1983

—o—

MILLER, et al.,

Appellants,

vs.

CALIFORNIA COMMISSION ON THE STATUS OF WOMEN,

Appellee.

—o—

On Appeal From the Court of Appeal of California Third Appellate District

—o—

APPELLANTS' REPLY TO APPELLEE'S MOTION TO DISMISS OR AFFIRM

—o—

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I.

APPELLANTS HAVE AMPLE STANDING TO PRESENT THIS APPEAL

Appellee California Commission on the Status of Women contends that this court lacks jurisdiction to hear this appeal due to appellants' lack of standing. (Motion, p. 5). The commission admits that appellants have standing as state taxpayers to attack commission expenditures but postulates an additional standing requirement for Article III appellate jurisdiction. (Motion p. 5). Since the appellants have drawn in question under 28 U.S.C. § 1257 the validity of California statutes on the ground of their repugnance to the federal constitution and since the state court's decision is in favor of the statutes' validity, this court has jurisdiction over this appeal. (See the antecedent reasoning of *Tyler v. Judges of Court of Registration,* 179 U.S. 405, 410, 414 (1900); *Crampton v. Zabriskie,* 101 U.S. 601 (1879); *Cochran v. Board of Education,* 281 U.S. 370 (1930); *Hawke v. Smith,* 253 U.S. 221 (1920)). Standing is often assumed or not questioned. *Levitt v. Committee for Public Education,* 413 U.S. 472 (1973). See also *Committee for Public Instruction and Religious Liberty v. Nyquist,* 413 U.S. 756 (1973); *Sloan v. Lemon,* 413 U.S. 825 (1973); *Adler v. Board of Education,* 342 U.S. 485 (1952).

Cases cited by the commission as authority for an independent federal standing requirement *(Cramp v. Board of Public Instruction,* 368 U.S. 278 (1961) and *Princeton University v. Schmid,* 455 U.S. 100 (1982) were not decided in the wake of an express state standing authorization. Indeed, in *Doremus v. Board of Education,* 342 U.S. 429 (1952) upon which the commission principally relies in order to preclude appellants' appeal for lack of standing, the court noted that there had been no trial and no findings of fact, no allegation or proof that the chal-

lenged statute providing for Bible reading in public schools cost the taxpayers more than an "incomputable scintilla;" there were no facts showing that the statute cost the taxpayers anything or that they were offended by it or that it conflicted with their convictions; and there was no allegation that the conduct was supported by a particular appropriation 342 U.S. at pp. 430-433.

By contrast, the complaint below not only charged the appropriation and funding of specific instances of commission political partisanship, but the commission admitted them. See jurisdictional statement; Appendix pp. A-50 through A-57, inclusive. Appellants testified at length about their offended convictions conflicting with the commission's propaganda and their inability to compete with the commission.

> Q (BY MR. BURTON) Do you, Mrs. Gillogley, with respect to the position the commission has taken, how have those positions affected you in any particular way, personal beliefs?
>
> A Well, I am personally opposed to abortion, and since I'm opposed to abortion, I am also opposed to the funding.
>
> * * *
>
> Q (BY MR. BURTON) With respect to the positions of the commission prior to March of 1980, and if I asked you the same questions that I just asked you about your distress with respect to each of the commission's positions, would your answer be the same?
>
> A Yes, I would.
>
> * * *
>
> Q . . . Do you have a personal conviction with respect to the morality of the abortion as a practice?
>
> A Yes, I do.
>
> Q And what is that position?
>
> A I believe I have heard the words "a woman's choice," but I have a strong conviction on the

right of the unborn child, the right of the father. I think a woman has the right to her own body, but after she gives it away, she loses some of those rights, and other people are involved, and I think that the unborn child has—definitely has rights and should be protected.

Q Is this a matter of moral conviction with you, or simply a matter of your political viewpoint?

A Well, it is a strong moral conviction, tied to my understanding of what life is and my respect for the things that God does in relationship to birth and coming into a mortal experience.

Q So does your moral conviction hold that life is sacred from conception?

A That's right.

Q Are you opposed then to any agency or process which would disturb or interrupt that life?

A Yes, I am.

* * *

Q Were the positions that your group, the pro-family coalition, took in any respect contrary to the positions of the California Commission on the Status of Women had taken?

A Oh, they were just the opposite, because out of these two documents, we found that the attitude was anti-marriage, anti-family, and it was pro-ERA. It was abusive. It was hostile and negative toward the role of the homemaker and the institution of marriage.

It was so explicit, we could hardly believe that they would be so frank in such a negative thrust against the interest of the present institutions of family life and marriage, as well as that role.

Q Did your group work against them, the California—well, I guess, against the Equal Rights Amendment?

A Oh, yes.

* * *

Q Did you feel that your group, the pro-family coalition, could effectively compete with the Califor-

nia Commission on the Status of Women in promoting your views to the public, as opposed to the commission's views on these various issues?

A Well, we have heard already wonderful testimony about really the structure of the commission and its tremendous access to individuals and to the legislature, and we feel that we cannot compete either financially or with the power, with the influence.

When something comes out with a seal of the State of California and the California commission, you can see the tremendous disadvantage that even an informal pro-family coalition can do.

We can work with each other, and we can work to educate, but it is real—well, we really feel the effects, especially because of the attitudes that are hostile against the traditional woman and homemaker that are in these two documents printed and written.

And because of our experience at USC when we were actually called the enemy.

Q Now, in view of that, can you point to any specific passages or areas there in those two source books which you feel are representative of the hostility or the—

A What I have felt?

Q Yes. What you have felt emanating from the commission as its official view which you feel is contrary and hostile to your pro-family view?

* * *

A . . . This is my fifth point, women are characterized in our culture—now, this is their opinion—as inconsistent, emotionally unstable, lacking in a strong conscience, nurturant, rather than productive, hedonistic, submissive, intuitive rather than intelligent, good at details rather than creative. Now, that is their definition of that traditional role.

Number six, kids being with their mothers as outdated notion that serves neither mothers nor children.

Q Would you give us the page, as though—as you go by?

A Oh, okay. The one on women are characterized in our culture as inconsistent was Page 266. Kids being with their mothers as outdated notion that serves neither mothers nor children, that is Page 106.

Q Work—

A Working mothers provide most positive role models and are better parents for growing children of both sexes, Page 198.

Mothers bear children, but there is no special need for her to rear them, Page 257.

There is no proved benefit from nursing mothers, Page 258.

The woman who is too devoted to motherhood may have a negative effect upon her children by binding them too closely to her, dampening their initiative and preventing their growth, Page 19.

A woman should keep her own name upon marriage to retain a proper self-estimation of her own identity, Pages 148, 187 and 197.

Housewives in all they do are not valued in our society, only gainful employment provides social prestige, Page 109.

Men should not have the burden of lifelong responsibilities for a family, Pages 112 to 113.

A family can be any group of people living together and cooperating in an economic and affectional unit over a period of time, Page 262.

Child care is a burden; it is unjust to prepare women only in that role, Page 194.

Our present need is zero population growth, Page 195.

Volunteer work lowers self-esteem, Page 106.

Military service is necessary to achieve first class citizenship, Page 149.

And, women who oppose ERA are socially irresponsible, fearful and lazy, Page 14.

That is a sample of what is in this book, totally offensive, unscientific, biased. The narrow feminist bias is explicit through the book, and the commission has acknowledged that these are the views of the commission.

The tremendous influence that they have on textbooks is and throughout the state and throughout the network is a tremendous problem to us as traditional women.

* * *

Q (BY MR. BURTON) Has the California Commission on the Status of Women represented your interests?

A Absolutely not.

Q Has it been detrimental to the things you hold important?

A Yes, it has.

RT pp. 86-87, 89, 501-502, 504-505, 505-506, 510-512, 513.

The court's judgment following a five-day trial reflected the extensive evidentiary record prompting the court to stop the commission's partisanship in the legislative forum. (Appendix pp. A-34 through A-43, inclusive). The budget of the commission for 1984 is $605,900 traced to an identifiable appropriation.

This court distinguished *Doremus* from *Everson v. Board of Education,* 330 U.S. 1, on the grounds that *Everson* showed "a measurable appropriation or disbursement of school district funds occasioned solely by the activities complained of" 342 U.S. at p. 434. Appellants' standing is governed by *Everson,* not by *Doremus.* After *Doremus, Flast v. Cohen,* 392 U.S. 83 (1968) allowed taxpayer standing in a case brought under the First Amendment's establishment clause, and distinguished *Doremus* on the ground that the tax contributions there were inconsequential. 392 U.S. at p. 102. On this appeal the state expenditures are substantial and the record below shows that the commis-

sion's lobbying activities were financed exclusively by state funds.

Furthermore, the federal taxpayer standing cases do not supply the nexus between the taxpayer statutes and the activity under attack to the same extent as do state taxpayer cases. This is because federal deficit financing and inflation which dilute the nexus are not comparably feasible at the state level. Moore's Federal Practice ¶57.-11 n. 102. Indeed, it would be incongruous for this court to rule that appellants do not have standing before it to challenge on federal constitutional grounds state expenditures which the California Legislature and courts have respectively provided and enhanced as a matter of ameliorative public policy. *Van Atta v. Scott,* 27 Cal. 3d 424, 450, 166 Cal.Rptr. 149, 613 P 2d 210 (1980). Such appears to be the view of the Ninth Circuit. *Ramsey v. Chaco,* 549 F 2d 1335, 1337 (9th Cir. 1977).

What is really at issue in public interest or taxpayer actions is whether the litigation will be framed with specificity, contested with adverseness and pursued with vigor. *Flast v. Cohen,* 392 U.S. 83, 106 (1968). *Van Atta v. Scott,* 27 Cal. 3d at p. 450. Moore's Federal Practice ¶57.-11; 36 U. Chicago L. Rev. 364, 373 (1969). This litigation reflects these virtues.

This court has granted standing where a federal statute authorizes judicial review. *Federal Communication Commission v. Sanders Brothers Radio Station,* 309 U.S. 470 (1940), even when the party is representing only the public interest. *Scripps-Howard Radio v. F.C.C.,* 316 U.S. 4, 14 (1942). No basis appears for distinguishing these federal cases from this appeal where a state statute expressly authorizes the taxpayer attack mounted. Cal. Code of Civil Procedure § 526a.

Baker v. Carr, 369 U.S. 186 (1962) emphasized the practical assurance of the effective presentation of the issues as the gist of the standing issue. Fed. Pract. & Procedure, *supra,* § 3531 at p. 185. This standing entitlement may include the vindication of aesthetic, conservational or recreational interests. *Scenic Hudson Preservation Conference v. Federal Power Commission,* 354 F 2d 608, 615-616, (2nd Cir. 1965), cert. den. 384 U.S. 941; *Office of Communications of the United Church of Christ v. Federal Communications Commission,* 359 F 2d 994, 1000-1006 (D.C. Cir. 1966); 425 F 2d 543 (D.C. Cir. 1970); *Sierra Club v. Morton,* 405 U.S. 727 (1972) 348 F. Supp. 219 (D.C. Cal. 1972); *United States v. Students Challenging Regulatory Agency Procedures* (SCRAP), 412 U.S. 669 (1973). In SCRAP, this court held that an "identifiable trifle" is enough for standing where a principle is at stake. 412 U.S. at p. 689 n. 14.

This court has even expanded the standing concept to allow litigants to vindicate the constitutional rights of third parties. *Griswold v. Connecticut,* 381 U.S. 479 (1965) (givers of contraceptive advice can raise the constitutional right of married couples to use contraceptives) *Buchanan v. Worley,* 245 U.S. 60, 62 (1917) seller of real property can challenge local ordinance precluding occupancy by negro buyer. See also *Barrows v. Jackson,* 346 U.S. 249 (1953); *Pierce v. Society of Sisters,* 268 U.S. 510 (1925). Private school operators can raise constitutional rights of parents to direct the upbringing of their children. *Eisenstadt v. Baird,* 405 U.S. 438, 445 (1972) distributor of contraceptive device can argue rights of distributees to use them. See also *Village of Euclid v. Ambler Realty Co.,* 272 U.S. 365, 384-385 (1926) owner of tract may raise rights of prospective buyers who were deterred from buying. *Hunter v. Erickson,* 393 U.S. 385 (1969) general fair

housing complaint without showing that plaintiff could have purchased a house. To same effect are *Village of Belle Terre v. Boraas,* 416 U.S. 1, 9-10 (1974) and *James v. Valtiera,* 402 U.S. 137, 139 (1971).

Finally, in areas where government has an absolute duty to protect citizen rights of free speech or to be scrupulously neutral in providing equal protection of the laws, little is required in the way of standing or causal nexus. *NAACP v. Button,* 371 U.S. 415, 432-33 (1963); *Aptheker v. Secretary of State,* 378 U.S. 500, 515-17 (1964); *Dumbrowski v. Pfister,* 380 U.S. 479, 486-487 (1965); *Norwood v. Harrison,* 413 U.S. 455, 465-466 (1973); *Gladstone Realtors v. Village of Bellwood,* 441 U.S. 91, 111-112 (1982); *Trafficante v. Metropolitan Life Ins. Co.,* 409 U.S. 205, 210 (1972).

Appellants' claims are certainly closer to *Flast* than to *United States v. Richardson,* 418 U.S. 166 (1974) and *Schlesinger v. Reservists to Stop the War,* 418 U.S. 208 (1979) since appellants attack state spending of their money for a propaganda ministry's legislative lobbying offensive to their ideological and moral convictions. They have proved that the state has established and propagates an idealogical and political orthodoxy at their expense and at the expense of their First Amendment rights to know the truth and not to support a political campaign in a legislative forum.

II.

THE FEDERAL QUESTIONS ON APPEAL ARE SUBSTANTIAL

This case does not come here on a test of the pleadings or as a citizen complaint, but is brought by taxpayers who have actively opposed the commission at their own expense and who prevailed in a trial on the merits. The facts of the commission's bias and partisanship are es-

tablished. The question is whether the state may constitutionally subsidize the commission's lobbying of the California Legislature. No public forum is more traditional than state legislative halls. The state's subsidy of its commission's established partisanship denies appellants equal voice in that forum. ". . . [W]e have frequently condemned . . . discrimination among different users of the same medium for expression." *Police Department v. Mosely,* 408 U.S. 92, 96 (1972). "Once a public forum is opened, equal access must be provided to all competing factions." *Stanson v. Mott,* 17 C 3d 206, 219, 130 Cal.Rptr. 697, 551 P 2d 1 (1976). *Stanson* also said that a serious constitutional question would be posed by an explicit legislative authorization to use public funds for partisan campaigning. *Ibid.* Section 8246, as interpreted by the Court of Appeal, is just such an explicit legislative authorization. The result is a state agency posing as an objective fact finder which in truth is neither objective, fair nor accurate in its partisan lobbying in the legislative forum of California. The direct abridgement to appellants' First and Fourteenth Amendment rights of equal access to that forum and their right both to know and to be heard is substantial.

Dated: September 7, 1984.

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